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No. 01-984

Supreme Court, U.S.
FILED
FEB 7 2002

In The

Supreme Court of the United States

HOWARD M. LEE, individually and on behalf of all others similarly situated,

Petitioner,

v.

AMERICAN NATIONAL INSURANCE COMPANY; AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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I. STATEMENT OF THE ISSUES

1. Whether, when the two statutory requirements of 28 U.S.C. § 1441(b) are met – that is, complete diversity between the plaintiff and multiple defendants and the amount in controversy exceeds $75,000 – removal jurisdiction on diversity grounds is authorized even if it is later determined that there is a lack of standing as to the claims against one of the defendants.

2. Whether, in a case satisfying the complete diversity requirements, a district court is nevertheless required under 28 U.S.C. § 1447(c) to remand the entire case when the plaintiff arguably lacks standing to bring his claims against one, but not all, of the diverse defendants.

II. STATEMENT OF THE CASE

This Petition arises from Plaintiff/Petitioner Howard Lee's ("Lee") desire to have his unique claims heard in state, rather than federal, court. Dissatisfied with the district court's rulings denying class certification and after this removed action had been pending in federal court without objection for over one and one-half years, Lee sought a remand to state court. In support of that motion, he admitted, as he had all along, that there was diversity jurisdiction, but nonetheless argued that a lack of standing as to some, but not all, of the removed claims required remand.

There was, and still is, one fundamental hurdle in Lee's effort to get back to state court: there has always been proper federal subject matter jurisdiction over this entire case. After considering full briefing by both parties

and holding a hearing on the issue, the district court properly denied Lee's motion for remand. The district court entered its Order Denying Plaintiff's Motion for Remand and Certifying Order for Appellate Review on March 4, 1999.

On appeal to the Ninth Circuit Court of Appeals, Lee argued that since he lacked Article III standing over his claims against *one* defendant, the district court somehow lacked diversity jurisdiction over this *entire* case. The fatal flaw in Lee's reasoning, however, was that in this extraordinarily unusual circumstance involving multiple defendants and claims that, in state court, do not require plaintiffs to have standing to bring them, diversity jurisdiction is not dependent upon a plaintiff's standing to litigate a claim against one of multiple defendants. Rather, the proper exercise of diversity jurisdiction turns solely upon a plaintiff's ability to meet the two statutory requirements under 28 U.S.C. § 1441(b). Nothing more.

On August 8, 2001, the Ninth Circuit recognized the central flaw of Lee's jurisdictional syllogism and affirmed the district court's holding:

> Lee's standing problem simply does not implicate the question whether the alignment of parties corresponds with § 1332's requirements for diversity jurisdiction. The parties in this case remain citizens of different states, over whom the federal court may exercise jurisdiction under § 1332(a)(1). Lee's lack of standing only renders his claims against [one defendant] nonjusticiable in federal court, but does not alter the presence of complete diversity.

Appendix, p. 16a.

As both the district court and the Ninth Circuit correctly ruled, diversity jurisdiction and Article III standing standards represent two separate points of analysis. Diversity jurisdiction is proper when, as here, there is complete diversity between all of the parties and the amount in controversy exceeds $75,000. Article III standing, on the other hand, addresses a plaintiff's ability to proceed on the merits of a case in federal court.

As there was no dispute that diversity jurisdiction existed at the time of removal, the Ninth Circuit confirmed the district court's unnoteworthy decision that remand to state court must be denied. The fact that this case raised the highly *sui generis* circumstance that, post remand, Lee lacked Article III standing to bring otherwise proper state court claims against one of multiple defendants did not support a different conclusion. Neither the removal statute nor the statute conferring diversity jurisdiction requires Article III standing as to each and every defendant for diversity jurisdiction to be proper. Thus, contrary to Lee's claim, his unique circumstance does not warrant remand to state court, nor is it appropriate for review here by writ of certiorari.

III. STATEMENT OF THE FACTS

There is no dispute about the facts of this case. Lee filed this action in March 1997 in his personal capacity and as a representative of a putative class against defendants American National Insurance Company ("ANICO") and American National Life Insurance Company of Texas ("ANTEX"). The action, filed originally in San Francisco Superior Court, alleged claims for consumer fraud in

violation of California's Business & Professions Code ("B & P Code") § 17200 et seq. and various other state law claims. Petitioner's Appendix ("Appendix"), p. 2a. In April 1997, Defendants timely removed the case to the district court on the basis of diversity jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1441. The removal was proper and uncontested. Appendix, p. 3a.

Subsequent to removal, Lee brought two motions for class certification. The first motion was for certification of a nationwide class. In his second motion, Lee sought to certify a statewide class action. As to defendant ANICO, Lee requested certification of a California class on all claims. The district court denied both motions for class certification of the claims against ANICO. With respect to defendant ANTEX, Lee requested certification of a California class only on his claim for unfair business practices under the B & P Code. The district court denied the motion for class certification as to the two claims against ANTEX. The denial appeared to be in conjunction with the court's finding that Lee suffered no actual injury in those claims and, therefore, did not have standing to litigate his claims against ANTEX in federal court. *Id.* The district court never suggested, much less held, that diversity jurisdiction did not continue, instead ruling that the denial of class certification was without prejudice.

Rather than proceed individually before the district court, however, Lee next sought to avoid federal jurisdiction altogether by seeking a remand of all claims in the action (individual and class-wide). *Id.*, p. 3a-4a. In the alternative and without explanation, Lee sought a partial remand the claims raised under the B & P Code.

Specifically, Lee requested remand under 28 U.S.C. § 1441(c) and 28 U.S.C. § 1447(c) on the ground that he purportedly lacked standing as to the claims against one, but not all, of the Defendant/Respondents. *Id.*, p. 4a. The district court properly denied this remand motion. As both the district court and, later, the Ninth Circuit Court of Appeals ruled, notwithstanding the district court's ruling as to Article III standing, it always had and still has diversity subject matter jurisdiction over the case. Remand under § 1447(c) was, therefore, improper.

IV. ARGUMENT

A. The Unique Procedural Issues Presented Here Are Not Appropriate For Review By Way of Certiorari.

This Petition seeks review of two related issues recently decided by the Ninth Circuit Court of Appeals: (1) whether, where the requirements of 28 U.S.C. § 1441(b) are met, diversity jurisdiction is destroyed simply because a plaintiff lacks Article III standing against one of the defendants and (2) whether a district court is required under 28 U.S.C. § 1447(c) to remand an entire case, in these circumstances, where the plaintiff has Article III standing to bring his claims against one defendant but arguably lacks Article III standing to bring some or all of his claims against the other defendant.

Presented with these same questions, the Court of Appeals made the correct and unremarkable determination that removal is proper and remand unavailable when there is original federal subject matter jurisdiction over a

case, even if there are claims over which Article III standing is lacking. Here, Lee reasserts his claim that the entire case should have been remanded due to an alleged jurisdictional deficiency over one, but not all, removed claims. Not only is Petitioner's construction of § 1441(b) and § 1447(c) incorrect, he does not even satisfy the threshold requirements for review by writ of certiorari.

The Supreme Court Rules are clear that a Petition for Writ of Certiorari "is not a matter of right, but of judicial discretion." Supreme Court Rule 10. In that spirit, "[a] petition for a writ of certiorari will be granted only for compelling reasons." *Id.* The Supreme Court Rules set out specific circumstances in which review may be appropriate. In an attempt to satisfy the requirements for review by certiorari, Petitioner claims the Court should grant review here because the Court of Appeals has decided an important question of federal law that has not, but should be, settled by this Court and/or had decided an important federal question in a way that conflicts with relevant decisions of the Court or that creates a conflict among the circuits. Petition, p. 10. As set forth more fully below, despite Petitioner's claims, neither circumstance is present here and the instant Petition should be denied.

1. The arcane procedural issues here present no compelling reason for the Court's review.

The issues presented here arise only in the unique and arcane situation where a case, containing multiple state claims against multiple defendants, is removed to federal court on the basis of diversity jurisdiction but

where, in federal court, plaintiff does not have Article III standing as to one of the defendants. This scenario would appear to be limited to California's *sui generis* relaxed standing rules in an isolated statutory context, namely B & P Code § 17200.

Here, Lee alleges claims for consumer fraud in violation of B & P § 17200 et seq. and various other state law claims against both ANICO and ANTEX. California's B & P Code § 17200 is a private attorney general statute that allows individuals to bring unfair business practices claims on behalf of the public even without having suffered any personal injury. Once removed, however, Lee could not establish standing to continue with this claim in federal court against ANTEX because he had not purchased an ANTEX policy and thus suffered no injury. Accordingly, even though California's unfair business practices statute requires no actual injury to pursue a claim in state court, Lee could not meet Article III's standing requirements as to one defendant in federal court.

This predicament of mixed standing claims is rare. California's "no standing" rule for claims under B & P Code § 17200 is peculiar and, therefore, the jurisdictional question presented here is neither compelling nor important and need not be settled by this Court. Indeed, this *sui generis* issue arises only in the limited and infrequent circumstances where diversity jurisdiction is proper, but where plaintiff fails to meet the requirements of Article III as to one of multiple defendants. Indeed, the issues raised by this Petition are particularly insignificant since the defective state law claim – the § 17200 claim – could have been, and may still be, refiled without consequence

in state court. Thus, the Court of Appeals' affirmation of the district court simply does not prejudice Lee in any cognizable way.

2. The Court of Appeals' affirmation of the district court's ruling neither conflicts with any relevant decision of this Court, nor does it create a conflict among the circuits.

The unusual issue of mixed standing claims in a diversity context has never arisen before in any published decision and the Court of Appeals' decision thus does not conflict with a ruling of this Court, any circuit court, or any State court of last resort. Not only has this issue never been considered, it is unlikely to arise again given the unique factual circumstances of this case.

Additionally and as set forth more fully below, to the extent that analogous situations have been considered and decided, the Court of Appeals' decision is in accord with this Court's relevant decisions on subject matter jurisdiction. Review by writ of certiorari is thus unwarranted.

B. There Is, And Always Has Been, Complete Diversity In This Case.

In addition to failing to meet the threshold requirement of Supreme Court Rule 10, this Petition also fails on its merits. It is a bedrock principle of federal law that cases, such as this one, between citizens of different states can be removed to federal court on the basis of diversity jurisdiction. 28 U.S.C. § 1441(b). Removal on diversity

grounds thus authorizes jurisdiction over a plaintiff's claims even though they arise under state law. *Id.* Significantly, the propriety of removal jurisdiction ordinarily is determined at the time the notice of removal is filed, and a plaintiff cannot thereafter oust the court of jurisdiction by changing the case or recharacterizing allegations in the complaint. *See Pullman v. Jenkins*, 305 U.S. 534, 537, 59 S.Ct. 347 (1939); *Hill v. Rolleri*, 615 F.2d 886, 889 (9th Cir. 1980).

Diversity jurisdiction is proper any time that the two statutory requirements of § 1441(b) are met. The moving party must show that complete diversity exists between the parties and that the amount in controversy has been satisfied. 28 U.S.C. § 1441(b). The statute requires nothing else. There is no dispute that Defendants/Respondents met these two statutory requirements. As a result, diversity plainly existed at the time of removal and thus Defendants/Respondents' removal of the case to federal court was proper.[1]

1. A finding that a plaintiff lacks Article III standing to bring some or all of his claims against one, of two, defendants, does not divest a district court of otherwise proper diversity jurisdiction.

Despite the propriety of federal diversity jurisdiction here, Lee nevertheless arduously mixes and matches the

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[1] At no time prior to his motion for remand did Petitioner ever contest the propriety of removal or the basis of diversity jurisdiction.

two distinct jurisdictional pieces of subject matter jurisdiction and Article III standing in an effort to obtain a remand of the action to state court. To that end, Lee argues that "subject matter jurisdiction is directly dependent upon the existence of Article III standing." (citations omitted). Thus, Petitioner claims, "if the plaintiff lacks standing to pursue the alleged claims, because of plaintiff's lack of a 'personal stake' or 'actual injury,' then there is no federal [diversity] jurisdiction." Petition, p. 12.

The gravamen of Petitioner's novel legal theory is that for the proper exercise of diversity jurisdiction, the Constitution requires – contrary to the express terms of 28 U.S.C. § 1441(b) – not only diversity of citizenship and a sufficient amount in controversy, but *also* that a "controversy" exist between a plaintiff and each and every defendant. Petitioner's unsupported assertions to the contrary, diversity jurisdiction is not predicated upon plaintiff's *standing* to bring particular claims against particular defendants. The statute does not contemplate Article III standing as part of the diversity inquiry. It does not and cannot follow, then, that a lack of Article III standing as to one defendant destroys complete diversity and otherwise proper standing under 28 U.S.C. § 1441(b). As the Ninth Circuit properly concluded, Article III standing has nothing to do with the presence of diversity jurisdiction or whether the case was properly removed, but rather simply provides a jurisprudential basis for declining to hear the merits of one, among many, of the properly removed claims.

2. Lee's contention that for federal subject matter to exist, "it is not enough that the parties are of diverse citizenship" is unsupported by law.

No authority exists to support the addition of a new Article III requirement to the proper exercise of diversity jurisdiction. Despite his reliance on them, the two main cases that Petitioner cites in support of this effort are inapposite and, ultimately, not dispositive of the issue before the Court. *See National Mutual Ins. Co. v. Tidewater Transfer Co., Inc.*, 337 U.S. 582, 69 S.Ct. 1173 (1949); *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003 (1998).

In *National Mutual Ins.*, this Court addressed the issue whether the statute authorizing the exercise of diversity jurisdiction over claims involving citizens of the District of Columbia was constitutional in view of the Article III's grant of federal judicial authority over cases and controversies "between citizens of different States." Relying on the *Hepburn and Dundas v. Ellzey*, 2 Cranch 445, 2 L.Ed. 332 (1805), this Court concluded that the District of Columbia was not a "State" within the meaning of the Constitution and, hence, could not be a "State" for purposes of the statute. *National Mutual Ins.*, 523 U.S. at 586, 69 S.Ct. at 1175. The Court held, however, that the statutory equivalent of § 1332 was nevertheless constitutional because Congress was authorized under Article I of the Constitution to make federal courts available to citizens of the District of Columbia and individuals suing such citizens. *Id.*, 523 U.S. at 600, 69 S.Ct. at 1182. From this specific and narrow holding, Lee mistakenly extrapolates to the unrelated conclusion that there must exist a

"case or controversy" within the meaning of Article III as to each and every defendant in order for the proper exercise of diversity jurisdiction. Petition, p. 14.

National Mutual Ins. does not answer the question presented here as to whether diversity jurisdiction always is destroyed simply because a plaintiff does not have Article III standing against one of multiple defendants. *National Mutual Ins.* does not even address the scope of Article III's "case and controversy" requirement nor does it discuss the issue of the existence of diversity jurisdiction where Article III's standing requirements are not met as to each and every defendant. Rather, *National Mutual Ins.* addresses the narrow and unrelated questions of the constitutional definition of the term "State" and the power of Congress, beyond Article III, to extend the reach of the federal judiciary to the District of Columbia.[2]

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 118 S.Ct. 1003 (1998) is equally unavailing. In support of the first step of his remand effort, Petitioner claims that *Steel Co.* represents a new overarching principle of constitutional jurisprudence whereby a district court must address the issue of Article III standing *before* it determines whether there is diversity jurisdiction. Petition, p. 15. Petitioner's reliance on *Steel Co.* is misplaced.

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[2] Notably, this Court did not address the question of statutory removal jurisdiction in *National Mutual Ins.* In that context, it has long been held that the presence of a jurisdictionally proper claim along with non-federal claims is permitted. *See* 28 U.S.C. § 1441(c).

As an initial matter, like *National Mutual Ins., Steel Co.* is not a case about the intersection of diversity jurisdiction and Article III's "case and controversy" requirement. Rather, this Court in *Steel Co.* simply decided that a federal court should not reach the merits of a claim before resolving the question of Article III jurisdiction. Thus, the *Steel Co.* limitation is fundamentally an objection to deciding "the merits" where jurisdiction is lacking. *See e.g.*, 523 U.S. at 101, 118 S.Ct. at 1003.

This Court's discussion in *Steel Co.* regarding the order of consideration of the jurisdictional aspects of the case before it does not control in the unique circumstances here. The holding in *Steel Co.* is simple – a plaintiff does not have standing to bring a claim for civil penalties for wholly past violations. While *Steel Co.* called into question how the Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S.Ct. 376 (1987), approached the case's jurisdictional question by deciding statutory subject-matter jurisdiction prior to Article III jurisdiction, *Steel Co.* notably did not overrule *Gwaltney*, but expressly reinforced that holding. *Steel Co.*, 523 U.S. at 91, 118 S.Ct. at 1011. Thus, Lee's reading of *Steel Co.* is too broad. *Steel Co.* does not hold that "the first inquiry must be 'whether there is a case or controversy under Article III.' " Petition, p. 16.

At bottom, there is simply no support for Lee's contention that "the Ninth Circuit approached this Constitutional issue *backwards*. . . . " Petition, p. 16. There is no authority, from either this Court or any circuit, holding that the existence of a "case or controversy" under Article III as to each and every defendant is integral to the

existence of federal diversity jurisdiction and must, therefore, be addressed *before* a district court assumes subject matter jurisdiction. Article III pertains only to a party's ability to litigate claims in a federal action, not to a district court's removal jurisdiction over an action. Thus, the Court of Appeals did not commit error and certainly not one of "constitutional magnitude." The Petition for Writ of Certiorari should be denied.

C. A Finding That A Plaintiff Lacks Article III Standing To Bring Some Claims Against One Defendant Does Not Authorize A District Court To Remand The Entire Case Back To State Court.

28 U.S.C. § 1447(c) governs the procedure whereby a federal court may remand a case. Section 1447(c) provides, in pertinent part, that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Lee argues that, because of a lack of standing on isolated claims, the *entire* case should be remanded under this statute. As will be shown below, this interpretation of § 1447(c) is mistaken.

Here, Lee's lack of standing against one defendant, ANTEX, does not divest the court of its diversity subject matter jurisdiction over the entire case or Lee of his federal standing as to the many other claims against the other defendant. The Supreme Court's recent decision in *Wisconsin Dept. of Corrections v. Schact*, 524 U.S. 381, 118 S.Ct. 2047 (1998) underscores this principle.

In *Schact*, defendants removed a state court complaint containing some claims barred by the Eleventh Amendment from being heard in federal court. This Court held that the presence of the barred claims did not destroy removal jurisdiction. In reaching this conclusion, this Court opined on the meaning of the phrase "*the case* shall be remanded" contained in § 1447(c). The *Schact* Court rejected Lee's view that if the court lacks subject matter jurisdiction over *any* claim, then *every* claim, *i.e.*, the entire "case" must be remanded. *Id.*, 524 U.S. at 391, 118 S.Ct. at 2054. The court stated that "an ordinary reading of the language indicates that the statute refers to an instance in which a federal court lacks subject matter jurisdiction over a 'case,' and not simply over one claim within a case." *Id.*

Thus, the fact that Lee may have no standing as to some claims against defendant, ANTEX, does not affect the continued subject matter jurisdiction of the district court, based on diversity, of this action. There is nothing in § 1447 that authorizes remand of an entire case where only isolated claims against one defendant fail under Article III.

In fact, as explained by this Court in *Schact*, § 1447(c) speaks to remand only of the entire "case" when there is no federal jurisdiction over any of the claims that remain. Such is not the case here. Lee's ability to bring his individual claims against the other defendant, ANICO, has remained untouched by the district court's determination. Federal diversity jurisdiction is thus still proper as to those remaining claims and, under the reasoning of *Schact*, remand is improper.

Lee points out that this Court noted in *Schact* that one might also read the language of § 1447(c) to include a claim within a case as well as the entire case and urges this Court to settle this hypothetically "open" question. Petition, pp. 25-26. Not even this more generous reading, however, rescues Lee's far-reaching position that the entire case should be remanded. Indeed, the *Schact* court held that even if § 1447(c) is construed to mandate remand when a claim within a case is barred, the statute, for purposes here, would "require remand only of the relevant claims, and not of the entire case as [Petitoner] contends." *Id.*, 524 U.S. at 392, 118 S.Ct. at 2054.

Lee also makes much of the fact that *Schact* and the other cases cited by the Court of Appeals involve federal question, not diversity, jurisdiction. This distinction, however, is one without a difference. Indeed, Lee's emphasis in this regard ignores one of the fundamental issues raised in this Petition: whether removal under § 1441(b) is improper simply because a separate and unrelated jurisdictional doctrine may prevent a plaintiff from litigating the merits of his claims against one defendant in federal court. In *Schact*, that separate bar was the Eleventh Amendment; here, it is lack of Article III standing. In both instances, however, isolated claims were constitutionally barred and could not be heard in federal court. Under these circumstances, this Court held in *Schact* that the continued exercise of federal jurisdiction was proper. So too here.

IV. CONCLUSION

As both the district court and the Court of Appeals held, dismissal of some claims for lack of Article III standing provides no basis for concluding that removal is improper or that remand of the entire case is appropriate particularly where the remaining claims are, as here, within the district court's federal subject matter jurisdiction and justiciable under Article III. This unremarkable conclusion is limited to the peculiar circumstance of this case, is in accord with analogous decisions regarding federal subject matter jurisdiction, and does not conflict with any decision of this Court or any circuit court. Accordingly, Defendants/Respondents respectfully request the Court to deny this Petition for Writ of Certiorari.

Respectfully submitted,

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